

**DEPARTMENT OF FOOD AND AGRICULTURE
PROPOSED CHANGES IN THE REGULATIONS
Title 3. California Code of Regulations
Article 43. Tomatoes**

FINAL STATEMENT OF REASONS

**UPDATE OF INITIAL STATEMENT OF REASONS/PLAIN ENGLISH POLICY
STATEMENT OVERVIEW**

The Initial Statement of Reasons/Plain English Policy Statement Overview is still valid. No public hearing was held or requested.

OPPOSING COMMENTS RECEIVED DURING 45-DAY COMMENT PERIOD

The Department received a letter dated May 10, 2004 from the Santa Barbara County Flower and Nursery Growers Association (Association) opposing the proposed definition for tomatoes labeled as “greenhouse grown”. The Association suggested the proposed regulation text of Section 1472.8 be modified to read:

Section 1472.8. Tomatoes, Greenhouse Grown Defined.

Tomatoes labeled with the term “greenhouse grown” shall be considered mislabeled unless tomatoes are grown in a fixed steel structure using irrigation and climate control ~~in an artificial medium that substitutes for soil~~. Tomatoes may be grown in either nutrient solution or soil.

The Association gives the following reasons for requesting the changes:

- Stating that tomatoes can only be grown in “fixed steel structures”, implies that greenhouses constructed of other types of materials are nonconforming, and therefore, should not be permitted. A lot of grief can be avoided by simply deleting the word steel.
- “In an artificial medium that substitutes for soil” implies the use of hydroponics as the growing method and should be defined in a separate section or sentence. The American Heritage Dictionary defines hydroponics as: “Cultivation of plants in nutrient solution rather than in soil”. Allowing tomatoes to be grown in either nutrient solution or soil provides flexibility and does not restrict the intent of the Department in defining what is “greenhouse grown”.

The Food and Agricultural Code exists to promote and protect the State’s agricultural industry and provides the Department with the authority to adopt regulations to provide consistency within the industry. Section 78636(b) of the Food and Agricultural Code provides a definition for the term “greenhouse grown” as it pertains to tomatoes. Modifying the text of the proposed regulation would be inconsistent as well as superceded by the existing definition, and therefore, impossible to enforce. Certainly, the

proposed changes offer a viable alternative. However, consistency within the regulations is vital for uniform enforcement. Furthermore, the current definition provided in Section 78636(b) of the Food and Agricultural Code is a statute and would require a legislative change to mirror the proposed adoption of Section 1472.8 as submitted by the Association. The legislative process is very lengthy and requires major industry support. The Department believes adopting the existing definition addresses the industry's concerns in a more-timely manner and is supported by the majority of the industry.

Currently, how an individual defines greenhouse production, as it pertains to tomatoes, is subjective. Some growers simply lay plastic over staked tomato plants, while other growers lay mesh or cloth over staked plants. Both call such production "greenhouse grown". Under the current regulation, these growers may market these tomatoes as either field or "greenhouse grown". Growers market their tomatoes based on current market conditions. If prices for "greenhouse grown" tomatoes are bringing a better price, these tomatoes will be sold as "greenhouse grown". If field tomatoes are bringing the higher price, then these same tomatoes will be sold as field tomatoes. Such agricultural practices are detrimental to producers who have invested in true hydroponics greenhouse operations.

Greenhouse tomato production is increasing throughout North America. Houewling Nurseries, located in Oxnard, California, has over eighty acres of high-tech greenhouse tomatoes that are grown year round. The California Tomato Commission (the petitioner) is a founding member of the North American Tomato Trade Work Group (NATTWG), which serves as advisor to the Consultive Committee on Agricultural Trade under the United States – Canadian Free Trade Agreement. After consulting with the Canadian membership, who are investors in the Oxnard, California operation, it is the belief of the California Tomato Commission that criteria be adopted into the California Code of Regulations for tomatoes labeled as "greenhouse grown" to protect the interests of California producers who have multi-million dollar investments in legitimate greenhouse operation.

The proposed regulation changes are intended to address unfair marketing practices, specifically, for tomatoes labeled as "greenhouse grown". They are not intended to prohibit growers from utilizing greenhouse structures constructed of materials other than steel. However, it is the consensus of the industry that tomatoes cannot be labeled with the term "greenhouse grown" unless they meet the existing definition. Growers can continue to use these structures and label these tomatoes as "hothouse" grown.

Furthermore, the request to delete "in an artificial medium that substitutes for soil" and add the statement "Tomatoes may be grown in either nutrient solution or soil." may offer more flexibility. However, again, the change does not provide consistency within the regulations and is not supported by the industry.

Therefore, the Department does not concur with the changes requested by the Association.

No opposing comments were received pertaining to the proposed regulation changes redefining the criteria for tomatoes labeled as “vine ripened”.

SUPPORTING COMMENTS RECEIVED DURING 45-DAY COMMENT PERIOD

The California Tomato Commission (Commission) continues to support the proposed regulation changes. In a faxed letter dated May 20, 2004, the Commission responded to opposing comments submitted by the Association pertaining to the definition of a “greenhouse grown” tomato. The Commission stated the following reason for their continued support and their opposition to the changes requested by the Association:

- The proposal is based upon an existing California statute. If the proposed regulation text were amended as requested by the Santa Barbara County Flower and Nursery Growers Association, the regulation would then be in conflict with the existing statute and unenforceable.

The Department also received a faxed letter, dated May 20, 2004, from Bill Wilber, President of Oceanside Produce Incorporated, a major California producer of “vine ripened” and other fresh tomatoes, supporting the proposed regulation and opposing the changes requested by the Association. Oceanside stated the following reasons for their support:

- Legislation enacted by the California Tomato Commission provides a definition for “greenhouse grown” tomatoes that we believe appropriate for defining greenhouse tomato production under Division 3, Subchapter 4, Article 43 of the California Code of Regulations.
- Adopting a different definition as proposed by the Association would be in conflict with the existing statute.
- The lack of a proper definition for “greenhouse grown” or “vine ripened” tomatoes has resulted in some growers identifying their products as “greenhouse grown” or “vine ripened” based upon market conditions from week to week. Such marketing tactics create instability and are detrimental to both growers and consumers.

The Department of Food and Agriculture concurs with the above comments and finds that the proposed regulation changes are necessary to provide consumers with the best possible tomatoes and will have a positive impact on the agricultural industry’s ability to market their product.

ALTERNATIVES

The Department has determined that no alternative considered by the Department would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.

ESTIMATED COSTS OR SAVINGS TO PUBLIC AGENCIES OR AFFECTED PRIVATE INDIVIDUALS OR ENTITIES

The Department has determined that no savings or increased costs to any state agency, no costs under "Part 7 (commencing with Section 17500) of Division 4" of the Government Code to local agencies or school districts requiring reimbursement, no other nondiscretionary costs or savings imposed on local agencies, and no costs or savings in federal funding to the State will result from these proposed regulations. The Department has also determined that these proposed regulations do not impose a mandate on local agencies or school districts.

SMALL BUSINESS IMPACT STATEMENT

The Department has determined that the proposed changes in the regulations would result in no significant added costs to small businesses affected by these proposed changes. The Department does recognize that there could be a potential economic impact to some growers. However, additional costs, if any, are unknown at this time. This is based on the fact that "vine ripened" tomatoes tend to be sold at a higher rate than other tomatoes thus generating more revenue. Currently growers have the ability to label tomatoes as "vine ripened" as long as they meet the color criteria at the time of preparing or packing regardless of the growing or ripening method. Some growers are harvesting green tomatoes and treating them with ethylene to begin the ripening process. Consumers are paying a premium price for tomatoes they believe were ripened on the vine. The proposed regulation changes would no longer allow ethylene treated tomatoes to be labeled as "vine ripened".

However, the Department believes the proposed regulation changes are necessary to protect the integrity of the industry as well as consumers from deceptive agricultural practices. The proposed changes meet the needs of both, the affected commodity group and the consumer, without requiring substantial changes on the part of industry.

ECONOMIC IMPACT ON AFFECTED BUSINESSES

The Department has determined that these proposed regulations would result in no costs to private businesses or individuals affected by these proposed regulations. This is based on the fact stated in the "SMALL BUSINESSES IMPACT STATEMENT."